

UNITED STATES OF AMERICA,

V.

Defendants.

Civil Action No. _____

CONSENT DECREE

WHEREAS, the Complaint alleges that Defendants violated CWA Section 301(a) by discharging dredged or fill material and/or controlling and directing the discharge of dredged or

Consent Decree

fill material into waters of the United States on and adjacent to certain areas of the property known as the Palette Ranch (the “Site”), located in and along the Imnaha River in Wallowa County, Oregon and more fully described in the Complaint, without authorization by the United States Department of the Army (“the Corps”);

WHEREAS, the Complaint further alleges that by discharging dredged or fill material and/or controlling and directing the discharge of dredged or fill material into and along the Imnaha River in Wallowa County, Oregon, Defendants have taken and will “take” threatened Snake River spring/summer (SRSS) chinook salmon by causing significant habitat modification or degradation which kills or injures SRSS chinook salmon by significantly impairing their essential behavioral patterns, including spawning, rearing, migrating, feeding and sheltering, in violation of ESA Section 9, 16 U.S.C. § 1538(a)(1)(B);

WHEREAS, the Complaint seeks (1) to enjoin the discharge of pollutants into waters of the United States in violation of CWA Section 301(a), 33 U.S.C. § 1311(a); (2) to enjoin the unauthorized “take” of SRSS chinook salmon in violation of ESA Section 9, 16 U.S.C. § 1538(a)(1)(B); (3) to require Defendants, at their own expense and at the direction of EPA and NMFS, to restore and/or mitigate the damages caused by their unlawful activities; and (4) to require Defendants to pay civil penalties as provided in 33 U.S.C. § 1319(d);

WHEREAS, this Consent Decree is intended to constitute a complete and final settlement of the United States' claims under the CWA and the ESA set forth in the Complaint regarding the Site;

WHEREAS, the United States acknowledges that Defendants do not admit and they expressly deny the allegations in the complaint filed against them by the United States;

WHEREAS, the United States and Defendants agree that settlement of this case is in the public interest and that entry of this Consent Decree is the most appropriate means of resolving the United States' claims under the CWA and the ESA against Defendants in this case; and

WHEREAS, the Court finds that this Consent Decree is a reasonable and fair settlement of the United States' claims against Defendants in this case, and that this Consent Decree adequately protects the public interest in accordance with the CWA, the ESA, and all other applicable federal law.

THEREFORE, before the taking of any testimony upon the pleadings, without further adjudication of any issue of fact or law, and upon consent of the parties hereto by their authorized representatives, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over the subject matter of these actions and over the parties pursuant to 28 U.S.C. §§ 1331, 1345, and 1355, Section 309(b) of the CWA, 33 U.S.C. § 1319(b), and Sections 11(c) and (e) of the ESA, 16 U.S.C. § 1540(c) and (e).

2. Venue is proper in the District of Oregon pursuant to CWA Section 309(b), 33 U.S.C. § 1319(b), ESA Section 11(c), 16 U.S.C. § 1540(c), and 28 U.S.C. §§ 1391(b) and (c), because the Defendants conduct business in this District, the subject property is located in this District, and the causes of action alleged herein arose in this District.

3. The Complaint states claims upon which relief can be granted pursuant to Sections 301, 309 and 404 of the CWA, 33 U.S.C. §§ 1311, 1319 and 1344 and Sections 9 and 11 of the ESA, 16 U.S.C. §§ 1538 and 1540.

II. APPLICABILITY

4. The obligations of this Consent Decree shall apply to and be binding upon Defendants, their officers, directors, agents, employees and servants, executors and administrators, and any person, firm, association or corporation who is, or will be, acting in concert or participation with any of the Defendants whether or not such person has notice of this Consent Decree. In any action to enforce this Consent Decree against a Defendant, the Defendant shall not raise as a defense the failure of any of its officers, directors, agents, employees, executors and administrators, or any person, firm or corporation acting in concert or participation with the Defendant, to take any actions necessary to comply with the provisions hereof.

5. The transfer of ownership or other interest in the Site shall not alter or relieve Defendants of their obligation to comply with all of the terms of this Consent Decree until termination of this Consent Decree as provided in Paragraph 49. At least fifteen (15) days prior to the transfer of ownership or other interest in the Site (except for transfers to the United States), at any time prior to termination of this Consent Decree as provided in Paragraph 49, the party making such transfer shall provide written notice and a true copy of this Consent Decree to its successors in interest and shall simultaneously notify EPA, NMFS and the United States Department of Justice at the addresses specified in Section X below that such notice has been given. As a condition to any such transfer, the Defendant making the transfer shall reserve all rights necessary to comply with the terms of those portions of the Consent Decree that remain in effect.

III. SCOPE OF CONSENT DECREE

6. This Consent Decree shall constitute a complete and final settlement of all civil claims for injunctive relief and civil penalties against the Defendants under CWA Section 301 and ESA Section 9 concerning Defendants' activities at the Site, as of the date of lodging of this Consent Decree.

7. It is the express purpose of the parties in entering this Consent Decree to further the objectives set forth in CWA Section 101, 33 U.S.C. § 1251, and ESA Section 2, 16 U.S.C. § 1531. All plans, studies, construction, remedial maintenance, monitoring programs, and other obligations in this Consent Decree or resulting from the activities required by this Consent Decree shall have the objective of causing Defendants to achieve and maintain full compliance with, and to further the purposes of, the CWA and the ESA.

8. The parties acknowledge that Nationwide Permit 32, found at 61 Fed. Reg. 65,913 (Dec. 13, 1996), authorizes certain fill at the Site in the amounts and areas set forth in Appendix A to remain in place, subject to the conditions provided in the Nationwide Permit and this Consent Decree. The parties further acknowledge that Nationwide Permit 32 authorizes the discharge of dredged or fill material insofar as such discharge is necessary to complete the work required to be performed pursuant to this Consent Decree. Any such discharge of dredged or fill material necessary for work required by this Consent Decree shall be subject to the conditions of the Nationwide Permit and this Consent Decree. The parties further acknowledge that, to the extent that any erosion, weather event, or natural catastrophe (such as an earthquake or fire) affects the Site, then such effect and any resulting environmental impacts at the Site shall not be

considered an unauthorized discharge or activity under the CWA, the ESA, the Wild and Scenic River Act, or otherwise a violation of the Consent Decree.

9. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Sections 402 or 404 of the CWA, 33 U.S.C. §§ 1342 or 1344, or any other law. Nothing in this Consent Decree shall limit the ability of the United States Army Corps of Engineers to issue, modify, suspend, revoke or deny any individual permit or any nationwide or regional general permit, nor shall this Consent Decree limit the EPA's ability to exercise its authority pursuant to Section 404(c) of the CWA, 33 U.S.C. § 1344(c).

10. This Consent Decree is not and shall not be interpreted to be a permit or modification of any existing permit issued pursuant to Section 10 of the ESA, 16 U.S.C. § 1539(a)(1)(B), or any other law. Nothing in this Consent Decree shall limit the ability of NMFS or NOAA to issue, modify, suspend, revoke or deny any individual permit or general permit issued pursuant to Section 10 of the ESA, 16 U.S.C. § 1539(a)(1)(B), or any other law.

11. Other than as provided for herein, this Consent Decree in no way affects or relieves Defendants of their responsibility to comply with any applicable federal, state, or local law, regulation or permit.

12. This Consent Decree in no way affects the rights of the United States as against any person not a party to this Consent Decree.

13. The United States reserves any and all legal and equitable remedies available to enforce the provisions of this Consent Decree and applicable law.

14. Nothing in this Consent Decree shall constitute an admission of fact or law by any party. No party, by entering into this Consent Decree, shall be deemed to have admitted any of the facts or allegations of fact or law alleged by the United States in its complaint. The Defendants to this Consent Decree expressly deny liability to the United States based upon those allegations or otherwise.

IV. SPECIFIC PROVISIONS

CIVIL PENALTIES

15. Gabriel shall pay civil penalties to the United States in the total amount of One Hundred Sixty-Five Thousand Dollars (\$165,000), within 30 days of entry of this Consent Decree as more specifically provided in Paragraphs 16 and 17 hereof.

16. Gabriel shall pay Ninety-Five Thousand Dollars (\$95,000) by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 2004V00822, EPA Region 10 and the DOJ case number 90-5-1-4-590. Payment shall be made in accordance with instructions provided to Gabriel by the Financial Litigation Unit of the United States Attorney's Office for the District of Oregon. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day.

17. Gabriel shall pay Seventy Thousand Dollars (\$70,000) by check or money order, made out to "Department of Commerce/NOAA." This payment shall be sent in accordance with instructions provided to Gabriel by the NOAA Office of General Counsel for Enforcement & Litigation. This payment shall be deemed to be made upon receipt by the Department of

Commerce. Upon receipt, the Department of Commerce shall deposit this payment into the Endangered Species Act (BL2D03) account at the Department of Treasury:

18. Upon payment of the civil penalties required by this Consent Decree, Gabriel shall provide written notice, at the addresses specified in Section X of this Consent Decree, that such payments were made in accordance with Paragraphs 15-17.

19. Civil penalty payments pursuant to this Consent Decree (including stipulated penalty payments under Section IX) are penalties within the meaning of Section 162(f) of the Internal Revenue Code, 26 U.S.C. § 162(f), or of 26 C.F.R. § 1.162-21 and are not tax deductible expenditures for purposes of federal law.

RESTORATION, MITIGATION, COMMUNITY PROJECT, AND COMPLIANCE WITH THE

CWA, ESA, AND WILD AND SCENIC RIVERS ACT

20. Gabriel shall perform restoration, mitigation, and community projects at the locations and under the terms and conditions stated in Appendices A and B appended hereto and incorporated herein by reference.

21. Upon completion of the terms and conditions of Appendix A, Gabriel shall not mow, cut, clear, cultivate, dredge, excavate, farm, fill, dewater, drain, develop, re-contour, use non-farming-related heavy equipment upon, or build structures of any size, at the restoration locations described in Appendix C attached hereto and incorporated herein (the "Restoration Locations"), subject to restoration or mitigation activities performed pursuant to this Consent Decree and Appendix A hereto (including the Restoration Locations subject to restoration or mitigation under any previous Administrative Order), except as (1) authorized by a CWA permit issued by the United States Army Corps of Engineers (for activities in waters of the United

States), or (2) authorized by the U.S. Forest Service (for activities outside of waters of the United States).

22. Except as in accordance with this Consent Decree, Defendants are enjoined from discharging at the Site any pollutant into waters of the United States, unless such discharge complies with the provisions of the CWA and its implementing regulations. Except as in accordance with this Consent Decree, Defendants are enjoined from any and all activities at the Site that violate the ESA and its implementing regulations. Except as in accordance with this Consent Decree, Defendants are enjoined from any and all activities at the Site that violate the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271 et seq., and its implementing regulations.

23. To ensure compliance with the terms of this Consent Decree, Gabriel shall ensure that any of his lessees, licensees, contractors, sub-contractors, or other agents performing activities at the Site have notice of, and comply with, those portions of this Consent Decree that are in effect. Within forty-five (45) days of the entry of this Consent Decree, Gabriel shall record a certified copy of Appendix D attached hereto and incorporated herein with the Recorder of Deeds Office, in Wallowa County, Oregon.

V. NOTICES AND OTHER SUBMISSIONS

24. Within 30 days after the deadline for completing any task set forth in Appendices A and B of this Consent Decree, Gabriel shall provide the United States with written notice, at the addresses specified in Section X of this Consent Decree, of whether or not that task has been completed.

25. If the required task has been completed, the notice shall specify the date when it was completed, and explain the reasons for any delay in completion beyond the scheduled time for such completion required by the Consent Decree.

26. In all notices, documents or reports submitted to the United States pursuant to this Consent Decree, the Defendant or Defendants who are required to submit the notice, document or report shall certify such notice, document or report as follows:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

VI. RETENTION OF RECORDS AND RIGHT OF ENTRY

27. Until ten (10) years after entry of this Consent Decree, Gabriel shall preserve and retain all records and documents now in their possession or control or which come into their possession or control that relate in any manner to the performance of the tasks in Appendices A and B, regardless of any corporate retention policy to the contrary. Gabriel shall also instruct their contractors and agents to preserve, until ten (10) years after entry of this Consent Decree, all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in Appendices A and B.

28. At the conclusion of the document retention period, Gabriel shall notify the United States at least 90 days prior to the destruction of unprivileged records or documents and,

upon request by the United States, Gabriel shall deliver such unprivileged records or documents to the United States.

29. A. Until termination of this Consent Decree, the United States, its authorized representatives at EPA and NOAA, and its contractors shall have authority at all reasonable times to enter the Site to:

- 1) Monitor the activities required by this Consent Decree;
- 2) Verify any data or information submitted to the United States;
- 3) Obtain samples for the purpose of determining whether the obligations under this Consent Decree are being fulfilled;
- 4) Inspect and evaluate Defendants' restoration and/or mitigation activities; and
- 5) Inspect and review any records required to be kept under the terms and conditions of this Consent Decree, the CWA, and the ESA.

B. Representatives of EPA and NOAA shall make reasonable efforts to provide Gabriel with advance notice prior to entering the Site pursuant to the above subparagraph.

C. This provision of this Consent Decree is in addition to, and in no way limits or otherwise affects, the statutory authorities of the United States to conduct inspections, to require monitoring and to obtain information from the Defendants as authorized by law.

VII. DISPUTE RESOLUTION

30. Any dispute that arises with respect to the meaning or requirements of this Consent Decree shall be, in the first instance, the subject of informal negotiations between the United States and Defendants affected by the dispute to attempt to resolve such dispute. A party claiming that a dispute exists will provide prompt written notice to the other party describing the

nature of the dispute and the legal and factual aspects thereof, including, if applicable, the basis for any penalties pursuant to Paragraph 38. The period for informal negotiations shall not extend beyond sixty (60) days following receipt of such written notice. If a dispute between the United States and Defendants cannot be resolved by informal negotiations, then the position advanced by the United States shall be considered binding unless, within thirty (30) days after the end of the informal negotiations period, the Defendants file a motion with the Court seeking resolution of the dispute. The motion shall set forth the nature of the dispute and a proposal for its resolution. The United States shall have thirty (30) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, the CWA, and the ESA, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree, the CWA, and the ESA.

31. If the United States believes that a dispute is not a good faith dispute, or that a delay would pose or increase a threat of harm to the public or the environment, it may move the Court for a resolution of the dispute prior to the expiration of the sixty (60) day period for informal negotiations. The Defendants shall have fourteen (14) days to respond to the motion and propose an alternate resolution. In resolving any such dispute, the Defendants shall bear the burden of proving by a preponderance of the evidence that the United States' position is not in accordance with the objectives of this Consent Decree, and that the Defendants' position will achieve compliance with the terms and conditions of this Consent Decree, the CWA, and the ESA.

32. The filing of a motion asking the Court to resolve a dispute shall not extend or postpone any obligation of Defendants under this Consent Decree, except as provided in Paragraph 40 below regarding payment of stipulated penalties.

VIII. FORCE MAJEURE

33. Defendants shall perform the actions required under this Consent Decree within the time limits set forth or approved herein, unless the performance is prevented or delayed solely by events which constitute a Force Majeure event. A Force Majeure event is defined as any event arising from causes beyond the control of Defendants, including but not limited to their employees, agents, consultants and contractors, which could not be overcome by due diligence and which delays or prevents the performance of an action required by this Consent Decree within the specified time period. A Force Majeure event does not include, inter alia, increased costs of performance, changed economic circumstances, changed labor relations, normal precipitation or climate events, changed circumstances arising out of the sale, lease or other transfer or conveyance of title or ownership or possession of a site, or failure to obtain federal, state or local permits.

34. If Defendants believe that a Force Majeure event has affected Defendants' ability to perform any action required under this Consent Decree, Defendants shall notify the United States in writing within fourteen (14) calendar days after the event at the addresses listed in Section X. Such notice shall include a discussion of the following:

- A. what action has been affected;
- B. the specific cause(s) of the delay;
- C. the length or estimated duration of the delay; and

- D. any measures taken or planned by the Defendants to prevent or minimize the delay and a schedule for the implementation of such measures.

Defendants may also provide to the United States any additional information that they deem appropriate to support their conclusion that a Force Majeure event has affected their ability to perform an action required under this Consent Decree. Failure to provide timely and complete notification to the United States shall constitute a waiver of any claim of Force Majeure as to the event in question.

35. If the United States determines that the conditions constitute a Force Majeure event, then the deadline for the affected action shall be extended by the amount of time of the delay caused by the Force Majeure event. Defendants shall coordinate with EPA to determine when to begin or resume the operations that had been affected by any Force Majeure event.

36. If the parties are unable to agree whether the conditions constitute a Force Majeure event, or whether the length of time for fulfilling the provision of the Consent Decree at issue should be extended, any party may seek a resolution of the dispute under the dispute resolution procedures in Section VII of this Consent Decree.

37. Defendants shall bear the burden of proving (1) that the noncompliance at issue was caused solely by circumstances beyond the control of Defendants and any entity controlled by Defendants, including their contractors and consultants; (2) that Defendants or any entity controlled by Defendants could not have foreseen and prevented such noncompliance; and (3) the number of days of noncompliance that were caused by such circumstances.

IX. STIPULATED PENALTIES

38. After entry of this Consent Decree, if Defendants fail to timely fulfill any requirement of the Consent Decree (including Appendices A through E), the Defendants shall pay a stipulated penalty to the United States for each day of violation(s) of this Consent Decree as follows:

- | | | |
|----|---|--------------------|
| A. | For Day 1 up to and including
Day 30 of non-compliance | \$500.00 per day |
| B. | For Day 31 up to and including
60 of non-compliance | \$1,000.00 per day |
| C. | For Day 61 and beyond
of non-compliance | \$2,000.00 per day |

Such payments shall be made without demand by the United States on or before the last day of the month following the month in which the stipulated penalty accrued.

39. Any disputes concerning the amount of stipulated penalties, or the underlying violation that gives rise to the stipulated penalties, that cannot be resolved by the parties pursuant to the Dispute Resolution provisions in Section VII and/or the Force Majeure provisions in Section VIII shall be resolved upon motion to this Court as provided in Paragraphs 30 and 31.

40. The filing of a motion requesting that the Court resolve a dispute shall stay Defendants' obligation to pay any stipulated penalties with respect to the disputed matter pending resolution of the dispute. Notwithstanding the stay of payment, stipulated penalties shall continue to accrue from the first day of any failure or refusal to comply with any term or condition of this Consent Decree. In the event that Defendants do not prevail on the disputed issue, stipulated penalties shall be paid by Defendants as provided in this Section.

41. To the extent Defendants demonstrate to the Court that a delay or other non-compliance was due to a Force Majeure event (as defined in Paragraph 33 above) or otherwise prevail on the disputed issue, the Court shall excuse the stipulated penalties for that delay or non-compliance.

42. In the event that a stipulated penalty payment is applicable and not made on time, interest will be charged in accordance with the statutory judgment interest rate provided for in 28 U.S.C. § 1961. The interest shall be computed daily from the time the payment is due until the date the payment is made. The interest shall also be compounded annually.

43. Defendants shall make any payment of a stipulated penalty by FedWire Electronic Funds Transfer ("EFT" or wire transfer) to the U.S. Department of Justice account in accordance with current electronic funds transfer procedures, referencing U.S.A.O. file number 2004V00822, EPA Region X and the DOJ case number 90-5-1-4-590. Payment shall be made in accordance with instructions provided to the Defendants by the Financial Litigation Unit of the United States Attorney's Office for the District of Oregon. Any payments received by the Department of Justice after 4:00 P.M. (Eastern Time) will be credited on the next business day. Further, upon payment of any stipulated penalties, Defendants shall provide written notice, at the addresses specified in Section X of this Decree.

X. ADDRESSES

44. All notices and communications required under this Consent Decree shall be made to the parties through each of the following persons and addresses:

A. TO EPA:

- (1) Deborah Hilsman
Assistant Regional Counsel
United States Environmental Protection Agency
Region 10
1200 Sixth Avenue, ORC-158
Seattle, WA 98101
- (2) Yvonne Vallette
EPA Oregon Operations Office
811 S.W. Sixth Avenue
Portland, OR 97204

B. TO THE UNITED STATES DEPARTMENT OF JUSTICE:

Letitia Grishaw, Chief
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

Jean Williams, Chief
Wildlife and Marine Resources Section
Environment and Natural Resources Division
Benjamin Franklin Station
P.O. Box 7369
Washington, D.C. 20044-7369

C. TO NMFS:

Rick Edwards
NOAA's National Marine Fisheries Service
Idaho Habitat Branch
10215 West Emerald, Suite 180
Boise, ID 83704

D. TO UNITED STATES FOREST SERVICE:

Tom Glassford
Lands Program Manager
Wallowa-Whitman National Forest
88401 Highway 82
Enterprise, OR 97828

E. TO DEFENDANTS:

George Gabriel/The Palette Ranch
c/o Harold G. Bailey, Jr.
GARVEY, SCHUBERT & BARER
1000 Potomac Street, N.W., 5th Floor
Washington, D.C. 20007

Ferro Labella & Zucker L.L.C.
27 Warren Street
Hackensack, New Jersey 07601

Kenneth L. Witty
c/o Lawrence Matasar
Lawrence Matasar, P.C.
621 S.W. Morrison Street, Suite 1025
Portland, OR 97205

S.P. Cramer and Associates
c/o Daniel E. O'Leary
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201

David Turner and
Turner Excavating Company
c/o Richard H. Allan
BALL JANIK LLP
101 Southwest Main Street, Suite 1100
Portland, OR 97204

XI. COSTS OF SUIT

45. Each party to this Consent Decree shall bear its own costs and attorneys' fees in this action. Should Defendants subsequently be determined by the Court to have violated the terms or conditions of this Consent Decree, Defendants shall be liable for any costs or attorneys' fees incurred by the United States in any successful action against Defendants for noncompliance with or enforcement of this Consent Decree.

XII. PUBLIC COMMENT

46. The parties acknowledge that after the lodging and before the entry of this Consent Decree, final approval by the United States is subject to the requirements of 28 C.F.R. § 50.7, which provides for public notice and comment. The United States reserves the right to withhold or withdraw its consent to the entry of this Consent Decree if the comments received disclose facts which lead the United States to conclude that the proposed judgment is inappropriate, improper, or inadequate. The Defendants agree not to withdraw from, oppose entry of, or to challenge any provision of this Consent Decree, unless the United States has notified the Defendants in writing that it no longer supports entry of the Consent Decree.

XIII. CONTINUING JURISDICTION OF THE COURT

47. This Court shall retain jurisdiction over this action in order to enforce or modify the Consent Decree consistent with applicable law or to resolve all disputes arising hereunder as may be necessary or appropriate for construction or execution of this Consent Decree. During the pendency of the Consent Decree, any party may apply to the Court for any relief necessary to construe and effectuate the Consent Decree.

XIV. MODIFICATION

48. Upon its entry by the Court, this Consent Decree shall have the force and effect of a final judgment. Any modification of this Consent Decree shall be in writing, and shall not take effect unless signed by both the United States and the Defendants and approved by the Court.

XV. TERMINATION

49. Except for Paragraphs 21, 22, and 23, this Consent Decree may be terminated by either of the following:

A. Defendants and the United States may at any time make a joint motion to the Court for termination of this Decree or any portion of it; or

B. Defendants may make a unilateral motion to the Court to terminate this Decree after each of the following has occurred:

1. Gabriel has completed and maintained compliance with all provisions of this Consent Decree and the CWA for twelve (12) consecutive months;
2. Gabriel has paid all penalties and other monetary obligations hereunder and no penalties or other monetary obligations are outstanding or owed to the United States;
3. Gabriel has certified compliance pursuant to subparagraphs 1 and 2 above to the Court and all Parties; and
4. Within forty-five (45) days of receiving such certification from the Defendants, the United States has not contested in writing that such compliance has been achieved. If the United States disputes Defendants' full compliance, this

Consent Decree shall remain in effect pending resolution of the dispute by the Parties or the Court.

50. Notwithstanding the termination of this Consent Decree pursuant to Paragraph 49, Defendants' covenants in Paragraphs 21, 22, and 23 shall remain in full force and effect and may be enforced pursuant to Paragraph 47 (Continuing Jurisdiction of the Court). Upon termination of this Consent Decree, Defendants shall promptly record certified copies of Appendices C and E with the Recorder of Deeds' office in Wallowa County, Oregon, which are attached hereto and incorporated herein.

IT IS SO ORDERED.

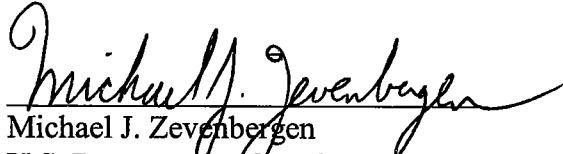
Dated and entered this _____ day of _____, 2005.

United States District Judge

ON BEHALF OF THE UNITED STATES:

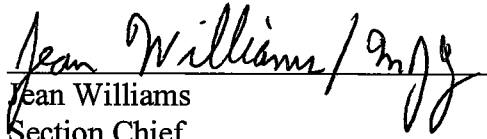
KELLY A. JOHNSON

Acting Assistant Attorney General
Environment and Natural Resources Division


Michael J. Zevenbergen

U.S. Department of Justice
c/o NOAA/Damage Assessment
7600 Sand Point Way NE
Seattle, WA 98115

Dated: May 26, 2005


Jean Williams

Section Chief
Wildlife and Marine Resources Section
Environment and Natural Resources Division
Benjamin Franklin Station
P.O. Box 7369
Washington, D.C. 20044-7369

Dated: May 26, 2005

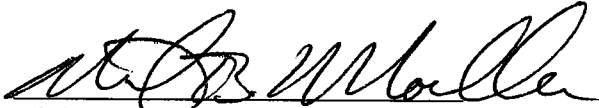
FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY


Walker Smith

Director
Office of Civil Enforcement
U.S. Environmental Protection Agency
Washington D.C. 20460

Date: 5-10-05

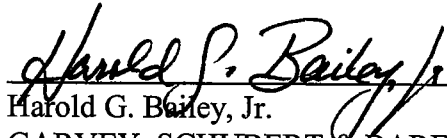
Of Counsel for NOAA:



Niel B. Moeller
Regional Enforcement Attorney
NOAA Office of General Counsel
for Enforcement & Litigation
7600 Sand Point Way N.E.
Bin C15700
Seattle, WA 98115

Dated: May 26, 2005

FOR DEFENDANT Gabriel



Harold G. Bailey, Jr.
GARVEY, SCHUBERT & BARER
1000 Potomac Street, N.W., 5th Floor
Washington, D.C. 20007

Dated: May 10, 2005

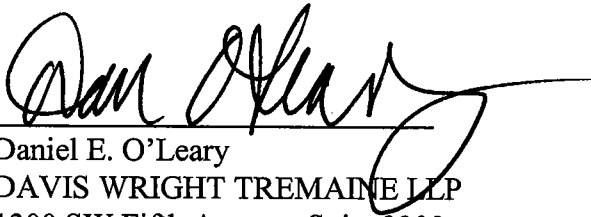
FOR DEFENDANT Kenneth L. Witty



Lawrence Matasar
Lawrence Matasar, P.C.
621 S.W. Morrison Street, Suite 1025
Portland, OR 97205

Dated: May 27, 2005

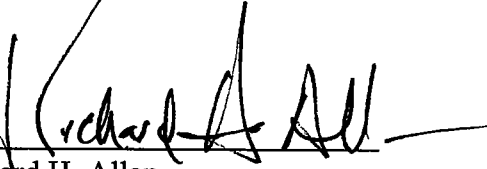
FOR DEFENDANT S.P. Cramer and Associates



Daniel E. O'Leary
DAVIS WRIGHT TREMAINE LLP
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201

Dated: 5-25-05

FOR DEFENDANTS David Turner and Turner Excavating Company



Richard H. Allan
BALL JANIK LLP
101 Southwest Main Street, Suite 1100
Portland, OR 97204

Dated: May 25, 2005